

Bill No. 12-09
Concerning: Ethics - Ex Parte
Communications
Revised: 3-16-10 Draft 5
Introduced: March 31, 2009
Enacted: March 16, 2010
Executive: _____
Effective: _____
Sunset Date: None
Ch. , Laws of Mont. Co.

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

By: Councilmembers Floreen, Ervin, and Leventhal;
Council Vice-President Berliner, and Council President Andrews

AN ACT to:

- (1) further define which communications are allowed when a decision must be made on the basis of a record; and
- (2) generally amend the County law regarding communications to decision-makers.

By amending

Montgomery County Code
Chapter 19A, Ethics
Section 19A-15

Chapter 2A, Administrative Procedures Act
Section 2A-8

Boldface	<i>Heading or defined term.</i>
<u>Underlining</u>	<i>Added to existing law by original bill.</i>
[Single boldface brackets]	<i>Deleted from existing law by original bill.</i>
<u>Double underlining</u>	<i>Added by amendment.</i>
[[Double boldface brackets]]	<i>Deleted from existing law or the bill by amendment.</i>
* * *	<i>Existing law unaffected by bill.</i>

The County Council for Montgomery County, Maryland approves the following Act:

1 **Sec. 1. Section 19A-15 is amended as follows:**

2 **19A-15. Disclosure of confidential information; ex parte communications.**

3 * * *

4 (b) (1) A public employee decision-maker must not consider any [ex
5 parte or private] communication made outside of the record
6 regarding any matter that must be decided on the basis of a
7 record[[,]] [after giving interested parties an opportunity for a
8 hearing] [[including any matter that would be subject to a future
9 on-the-record proceeding which is reasonably foreseeable. A
10 future proceeding is reasonably foreseeable if an interested party:

11 (A) has engaged an attorney, expert, planner, architect, or other
12 consultant to perform work on a specific matter that would
13 be subject to a future on-the-record proceeding; or

14 (B) has taken any other action to prepare to file an application
15 or other document on a specific matter that would be
16 subject to a future on-the-record proceeding]]

17 after an application is filed or a proceeding is otherwise initiated.

18 (2) Except as otherwise expressly authorized by law, any public
19 employee decision maker, and any public employee who directly
20 advises a decision maker, must not:

21 (A) initiate or participate in any communication outside the
22 record with any person regarding a matter that must be
23 decided on the basis of a record; or

24 (B) conduct an independent investigation of any fact [[in or]]
25 related to [[a record of]] a matter that [[is before or will
26 come before the decision-maker]] must be decided on the
27 basis of a record.

(3) The recipient of any communication made outside the record, including advice rendered by officials or staff of another government agency, must [incorporate any ex parte or private] promptly enter that communication in the record. If the communication was oral, the recipient must write down the substance of the communication and enter it into the record. The decision-making body may consider [ex parte or private communications] any communication made outside of the record if all parties are given [an appropriate] a reasonable opportunity to respond.

(4) This subsection does not [apply to] restrict a communication that consists solely of:

[(1)] (A) advice rendered to a decision-maker by an attorney [for the County] employed or retained by the decision-maker's agency;

[(2)] (B) advice rendered to a decision-maker by appropriate officials or staff of [County or other government agencies] the decision-maker's agency;

(C) a procedural question that does not involve the substance of facts in a record; and

[(3)] (D) discussions between members of a decision-making body.

Sec. 2. Section 2A-8 is amended as follows:

2A-8. Hearings.

* * *

(b) Official record.

(1) The hearing authority must prepare, maintain and supervise the custody of an official record in each case. The record must include testimony, exhibits and verbatim transcript, if any, submitted during the hearing and at other times the record is open to receive evidence. Documentary evidence may be received in the form of copies, excerpts, photographic reproductions or by incorporation by reference. The hearing authority must make the official record available for inspection to all affected persons before any hearing.

(2) [[a. This paragraph applies to any ex parte or private communication, written or oral, received by a member of a hearing authority if:

- (i) the communication relates to a contested matter before the hearing authority;
- (ii) all appellate rights regarding the contested matter have not been exhausted; and
- (iii) the hearing authority is required by law to make a decision on the matter based on the record before it.

b. This paragraph does not apply to:

- (i) legal or technical advice rendered by government agency staff or an attorney for the County at the request of the hearing authority;
- (ii) any communication about the status or procedure of a pending matter or;
- (iii) any communication between members of the hearing authority.

- 80 c. If a member of a hearing authority receives an oral ex parte
 81 or private communication, that member must reduce the
 82 substance of the communication to writing within a
 83 reasonable time after receipt of the communication.
- 84 d. If a final administrative decision has not been made prior
 85 to receipt of the ex parte or private conversation, the
 86 hearing authority must send a written notice to all parties
 87 that discloses the contents of the communication and states
 88 whether the hearing authority will consider the
 89 communication as a basis for its decision under
 90 subparagraph e.]]

91 [[e.]] Section 19A-15(b) applies to any ex parte or private
 92 communications received by a member of a hearing
 93 authority. The hearing authority must include the ex parte
 94 or private communication in the record and may:

- 95 (i) consider the communication as a basis for its
 96 decision after giving all parties an opportunity to
 97 respond to the communication; or
- 98 (ii) decide the matter if the hearing authority expressly
 99 finds that it has not considered the communication
 100 as a basis for its decision.

101 [[f.]] The substance of an ex parte or private communication
 102 received after a final administrative decision and before
 103 appellate rights have been exhausted must be maintained
 104 in the case file and, in [[the event of]] any remand, treated
 105 [[in accordance with all other provisions of]] as required
 106 by this paragraph.

107 * * *

108 *Approved:*

109

110 Nancy Floreen, President, County Council Date

111 *Approved:*

112

113

114 Isiah Leggett, County Executive Date

115 *This is a correct copy of Council action.*

116

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118 Linda M. Lauer, Clerk of the Council Date